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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

and

OCTOBER TERM, 1963

No. 640

CARL I. COHEN,

*Petitioner,*

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## PETITION FOR JOINT OR CONSOLIDATED REHEARING OF DENIALS OF CERTIORARI and MOTION FOR LEAVE TO FILE (*Pro Tanto*) PETITION FOR REHEARING OUT OF TIME, AS TO NO. 640, OCTOBER TERM, 1963

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## PETITION FOR JOINT OR CONSOLIDATED REHEARING OF DENIALS OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner, Carl I. Cohen, respectfully prays for relief as hereinafter specified.

The petition for certiorari in this case at the present Term was denied December 5, 1966, with the words "for lack of a final judgment".

That petition for certiorari sought review of a judgment or order of the Court of Appeals of the State of New York which had affirmed, after full appeal on the merits, an order of the Appellate Division, Second Department, Supreme Court of the State of New York, which in turn

had affirmed with modification an evidence-suppression order granted by the Supreme Court of the State of New York, Kings County (Rinaldi, J.), on motion of the within petitioner Cohen who had sought (pretrial) such suppression of evidence in a New York State prosecution for abortion. The pretrial suppression order by Justice Rinaldi vacated an ex parte wiretap order and directed the suppression of evidence procured by such wiretap together with evidence secured by unlawful search and seizure. The above-mentioned appeals resulted in modification of Justice Rinaldi's suppression order by reversing the portion of that order which had vacated the ex parte wiretap order and had suppressed the wiretap evidence; the appeals affirmed the suppression of the search-obtained evidence.

In our aforesaid 1966 Term petition for certiorari which, as said, was denied December 5, 1966 "for lack of a final judgment," we had ourselves tried to anticipate the problem of jurisdiction in point of "finality", as follows (Pet. Cert. 2-4, plus fn. at 4-5):

> "Under the New York State statutory procedure for motion-to-suppress proceedings of the above-mentioned type (N.Y. Code Crim. Proc. §§ 813-c et seq.), the State (the People) is not permitted to pursue the State statutory avenue for review of an order of suppression (such as had here been granted by Justice Rinaldi) without first filing a formal statement asserting that the deprivation of the use as evidence of the items suppressed makes it impossible in law or effectively destroys any reasonable possibility in fact to carry forward the criminal prosecution involved to a conviction (*id.*, § 518-a). The State filed such a statement in this case as a condition of being permitted to appeal to the Appellate Division

from Justice Rinaldi's order of suppression. We submit that, by reason of the statute last cited and the filing by the State of the statutorily required statement just mentioned, it is to be taken that under the law of the State of New York the suppression order of Justice Rinaldi was the equivalent of a final and not merely an interlocutory order in the within proceedings, i.e., Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indictment or indictments involved.

In the appeal taken by the State to the Appellate Division, to review Justice Rinaldi's order of suppression, the partial modification ordered by the Appellate Division had the result of rendering the indictments no longer necessarily impossible to prosecute to a conviction. The petitioner herein then appealed to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, i.e., under the judgment or order of the Court of Appeals it is likewise no longer necessarily impossible for the State to prosecute the indictments forward to a conviction.

It is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved. But it is believed that this is not the test of 'finality' for the purpose of this Court's certiorari jurisdiction in the present instance. Justice Rinaldi's order of suppression did produce a result of finality in view of the New York legislation and practice previously referred to (Code Crim. Proc. § 518-a), and it would not seem that the subsequent appellate modifications which revived a practical pos-

sibility of continuing the prosecution under the indictments can alter the legal or jurisdictional significance of the fact that petitioner did at one stage have what amounted to a final judgment in his favor (Justice Rinaldi's suppression order), and that now the highest State appellate court has rendered a final judgment depriving petitioner of the benefits of the lower Court's final judgment which, if it had not been modified on appeal, would have terminated the criminal prosecution.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States, and under 47 U.S.C. § 605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. § 813(a)) on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. § 605 as given supremacy by Article VI of the Constitution of the United States.*

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* Our above suggestions as to jurisdictional finality on the instant record make it appropriate to add the following: An earlier stage of this litigation (i.e., of the proceedings by petitioner Cohen seeking suppression of evidence obtained by wiretap and search) was before this Court in *Cohen* v. *New York*, 375 U.S. 985 (Oct. Term 1963, No. 640), cert. denied. In the latter proceeding we called attention to the suppression proceeding, then concurrently pending, which has now eventuated in the present petition for certiorari, and we noted the jurisdictional problems which at that time remained unmatured but are now believed to be mature for consideration by this Court in the instant proceeding. See Pet. Cert., pp. 2-3, 5-19, *Cohen* v. *New York*, Oct. Term 1963, No. 640, cited *supra*"

Our main purpose in having quoted the above jurisdictional presentation which was contained in our recent petition for certiorari, is to focus attention upon the above-quoted footnote item which refers to the earlier stage of this litigation, in which certiorari was denied at 375 U.S. 985, No. 640, October Term 1963, as indicated in that above quoted footnote.

The reasons why we are respectfully inviting attention to that earlier (October Term 1963) certiorari application are: As recited in that earlier petition for certiorari (October Term 1963), our certiorari application at that time sought review of certain New York State Court proceedings in which we had unsuccessfully sought to invoke the general or inherent State Court constitutional jurisdiction to grant a remedy in the nature of a civil remedy against a claim of unconstitutional aggrievement against a citizen who had been made the victim of illegal or unconstitutional telephone wiretapping. In other words, our prior petition for certiorari, at the October 1963 Term, was on the theory that a party ought to have an opportunity to challenge, in a State Court, a claimed invasion of his constitutional rights of telephone privacy, without having to await the institution of State criminal proceedings against him based on the telephone wiretap evidence or leads.

In that 1963 Term petition for certiorari we also brought to this Court's attention that there might well be a jurisdictional infirmity in our then application for certiorari, because, as we there advised this Court, we were engaged, at that same time, in also and concurrently pursuing the New York State remedy by way of the conventional type motion-to-suppress proceeding to challenge the telephone

wiretap *via* a pretrial motion to suppress in the criminal proceeding as such (under the abortion indictments). We also suggested, in the aforesaid 1963 Term petition for certiorari (pp. 17-18), that this Court, before finally disposing of that 1963 Term petition for certiorari, might wish to await the outcome of the then concurrent motion-to-suppress proceeding. However, as above indicated, certiorari was denied in the 1963 Term certiorari proceeding without awaiting any such further developments (375 U.S. 985).

With the above background in mind, the focus of the latest certiorari application (the within 1966 Term petition, no. 614) may emerge more meaningfully, for the purposes of the rehearing application which we are here presenting. The latest (1966 Term, No. 614) petition for certiorari has sought, as seen, review of the State Court proceedings on our plenary motion to suppress—i.e., on our conventional motion to suppress which we brought in the State Court criminal proceedings as such, as distinct from our aforementioned 1963 Term certiorari application in which we were going on the theory of a civil remedy, as it were, against unconstitutional electronic eavesdropping in the form of telephone wiretapping.

In turn now, with all of the above in mind, we may formulate as follows the gist of the theory on which we are making the present application for rehearing. This recent (second) certiorari application of ours having been denied "for lack of a final judgment", would it not be jurisdictionally appropriate for this Court to re-entertain, on a consolidated basis, *both* of our petitions for certiorari, *viz.*, the 1963 Term petition (no. 640) and the instant 1966

Term petition (no. 614)? That is, since our 1963 Term petition for certiorari did, unquestionably (as it seems to us) involve "finality" of decisional action on the part of the State Courts in the meaningful (jurisdictionally-"final") sense that the State Courts in that 1963 Term proceeding *finally* struck down our claim of right to a distinct civil-type remedy against allegedly unconstitutional wiretapping; or since, at the least, if that 1963 Term proceeding was jurisdictionally defective in "finality" terms it was so only on the theory that the then concurrent State motion to suppress proceeding was not yet "final"; and *both* the 1963 Term civil-type State Court proceeding and the 1966 Term conventional motion-to-suppress State Court proceeding are now concluded—subject only to what may further eventuate at the trial of the State indictments—would it not be proper under this Court's jurisdictional "finality" standards to allow to us now a *joint* or *consolidated* rehearing of the two certiorari applications involved

Aside from the somewhat unorthodox nature of our above suggestion—and we readily acknowledge that the suggestion is unusual—there would appear to be no insuperable obstacle to the granting of such a joint or consolidated rehearing and, ultimately, to the granting of certiorari following such rehearing:

(1) So far as concerns the out-of-time aspect of the portion of our within request which would entail this late-date granting of rehearing in the 1963 Term proceeding, we respectfully refer to *United States* v. *Ohio Power Co.*, 353 U.S. 93, where, after having denied two successive petitions

for rehearing of denial of certiorari, the Court *sua sponte* granted the petition for rehearing, vacated the order denying certiorari, granted the petition for certiorari, and reversed the judgment below, the Court commenting that, "We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules".

(2) So far as concerns the question of the availability, under the practice of the Courts of the State of New York, of either a civil remedy of the sort which we sought in our 1963 Term petition, *supra,* or the availability of the joint or consolidated remedy (at State Court level) which we seek by the within petition for rehearing, we respectfully invite the Court's attention to *Siegel* v. *New York,* U.S. , 16 L. Ed. 2d 682, October Term 1965, no. 1236, cert. denied, where the petition for certiorari (pp. 20-23) noted that, apparently, only two of the seven Judges of the New York Court of Appeals in that case unequivocally ruled against the availability of such a civil remedy on behalf of the party claiming to be aggrieved by unconstitutional electronic eavesdropping, while at least three of the Judges of that Court favored the entertaining of such a civil suit, and the remaining two of the seven Judges of that Court appear to have left the question open as to the availability of such remedy; the *Siegel* case, *supra,* indeed makes our situation *a fortiori* in at least one significant respect, i.e., in *Siegel* the party who unsuccessfully sought the civil remedy in the State Courts had not yet carried through to completion (in fact he had not yet even commenced) the conventional motion-to-suppress proceeding which in our case has been concurrently carried through to completion,

together with the unsuccessful civil proceeding.* The *Siegel* decision of the New York Court of Appeals, *supra*, is reported as *Siegel* v. *People of the State of New York*, 16 N.Y. 2d 330.

(3) It would appear, then, that at least in principle the civil aspect of the remedy against unconstitutional electronic eavesdropping, of which we are here speaking, is available under the practice of the New York State Courts. There still remains, admittedly, the question of whether the New York State Courts would entertain, in the particular circumstances of our case, a suit of such civil nature; and this problem is to be considered, we suggest, in relation to the fact that our case happens to involve also a *completed* (at State Court level) conventional motion-to-suppress proceeding brought and conducted pretrial in the criminal prosecution as such. To restate this latter question, it remains open whether, had the New York State Courts in our case been presented with the kind of joint or consolidated application which we are now asking this Court to consider—i.e., had the New York Courts been asked to grant to the within petitioner Cohen a remedy partaking jointly or consolidatedly of the civil-type remedy plus the motion-to-suppress type of remedy against the claim of unconstitutional electronic eavesdropping—would the final, unreviewed determination of the New York State Courts on such a joint or consolidated proceeding have resulted, intrinsically or necessarily, in a "final" State Court judgment for the purposes of the exercise of this Court's certiorari jurisdiction?

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* *Siegel* involved room-"bug" eavesdropping of the "trespassory" type; our case involves telephone wiretapping. We submit that this factual difference between the two cases is not significant for present purposes.

(4) In the present posture of the record of the within certiorari proceeding (the October 1966 Term petition, no. 614) taken in conjunction with the record of the 1963 Term proceeding (no. 640) the fact is, we realize, that, for the purposes of this petition for rehearing taken by itself without more or at first blush, we are in effect asking this Court to reconsider its heretofore declination of certiorari review (by granting such rehearing on the joint or consolidated basis above suggested), when there has not yet been had any State Court determination of any such joint or consolidated proceeding. Therefore, we hereby respectfully inform this Court that, in the hope of eliminating any continuing jurisdictional infirmity of "finality" as regards our obtaining such a State Court determination on the joint or consolidated basis here being broached, we intend to make a prompt application—expectedly not later than the week of January 16, 1967—to the Court of Appeals of the State of New York along the direction, parallel to the procedural direction above outlined, of a joint and consolidated application for rehearing or re-argument in that Court (the New York Court of Appeals), whereby there may be obtained a determination by that Court, which we hope would have the requisite "finality" for the purposes of this Court's certiorari jurisdiction, in which we would ask the New York Court of Appeals to grant rehearing or re-argument of *both* the civil-type proceeding which reached this Court at the 1963 Term (no. 640) and the motion-to-suppress proceeding which has reached this Court at the present (1966) Term (no. 614); we would be asking the New York Court of Appeals, in such application for reconsideration of the latter two proceedings on a joint or consolidated basis, to take into account that by virtue of

the procedural and jurisdictional amalgamation which might properly be allowed with respect to the two proceedings, the Court of Appeals should render a determination on the merits (procedural or substantive, or both) of the two proceedings considered conjointly. Under the distinctive re-argument procedure of the Court of Appeals of the State of New York there would appear to be no time limitation for the making of such application (*Cohen and Karger, Powers of the New York Court of Appeals*, pp. 695-696; see *Rules of the New York Court of Appeals*, Rule XX).

Petitioner therefore respectfully prays as follows:

I. That this petition for rehearing of the denial of certiorari in the within case no. 614, October Term, 1966 be granted;

II. That, jointly or consolidatedly with the granting of this petition for rehearing in case no. 614 of October Term 1966, rehearing be granted as to the denial of certiorari in case no. 640, October Term 1963; and that said two cases be joined and consolidated for the purposes of this petition for rehearing;

III. That, in the event the Court is not disposed to grant the above prayers nos. I an II in the present posture of the respective records of the 1968 Term proceeding and the 1966 Term proceeding involved, the Court may please defer final disposition of said prayers and of this petition for rehearing until, at least, petitioner has an opportunity to make an appropriate supplemental filing in this Court, which will be done on or before January 25, 1967, in which supplemental filing petitioner hereby represents

that he will include properly certified or otherwise properly authenticated copies of the entirety of the papers which, he hereby further represents, he will file in the Court of Appeals of the State of New York not later than during the week of January 16, 1967, for the purpose of requesting the latter Court to grant a joint or consolidated rehearing or re-argument of the matters involved in the aforementioned proceedings in this Court which were docketed as no. 614 October Term 1966 and no. 640 October Term 1963; and

IV. Petitioner respectfully moves, should such be deemed procedurally necessary, for leave to file, out of time, the *pro tanto* portion of this petition for rehearing which relates to the denial of certiorari in no. 640, October Term 1963.

Respectfully submitted,

KLEINMAN, GOLD and LANDSMAN,
*Attorneys for Petitioner Carl I. Cohen.*

EUGENE GOLD,
*Of Counsel.*

## Certificate of Counsel

We hereby respectfully certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in Rule 58(2), in that there is, or very shortly will be, an intervening circumstance of substantial or controlling effect, namely, petitioner's intended application to the Court of Appeals of the State of New York above described; and in that, for the purposes of rehearing consideration by this Court at the present juncture, there is available to petitioner the substantial ground not previously presented that a joint or consolidated reconsideration of the prior and the present certiorari applications would or could properly result in a determination that "finality" exists for certiorari jurisdictional purposes.

Respectfully submitted,

KLEINMAN, GOLD and LANDSMAN,
*Attorneys for Petitioner.*

EUGENE GOLD,
*Of Counsel.*